

No. 10,747

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ORVEY RAY TURNBEAUGH and DEVEINE FLOY
TURNBEAUGH,

Appellants,

VS.

MARY A. SANTOS,

Appellee.

BRIEF FOR APPELLEE.

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FILED

AUG - 8 1944

PAUL P. O'BRIEN,
CLERK

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A. INTRODUCTION.

At the time of the filing of the petition in bankruptcy involved herein, the bankrupts listed as a portion of their assets certain real property and buildings appurtenant thereto, situated near the City of Manteca, County of San Joaquin, State of California. The bankrupts claimed this real property as being exempt by virtue of a declaration of homestead covering the same. In their declaration of homestead the bankrupts stated that these premises were in effect the actual place of residence of the bankrupts and their family at the time of the execution of the declaration. Evidence was introduced at the conclusion of which

the Referee stated (Transcript, page 148): "The Court has stated that it is satisfied that these people were sleeping there in that garage, but that they maintained their home where the children were, and they ate, and all the family affairs were carried on at the other place." Thereafter the Referee specifically found (Transcript, page 34): "The Court is convinced that the bankrupts did not actually reside on the premises herein involved on November 15, 1940 and that any semblance of residence thereon, at the time of the declaration, was not real, but sham and pretended and not bona fide and genuine. Inasmuch as the homestead statutes require actual residence at the time of the declaration of homestead, it must follow that said homestead is invalid and of no force and effect whatever."

Thereafter the bankrupts' claim of exemption was denied and this appeal taken.

The real issue thus presented by this appeal is the question of whether or not the evidence supports the finding of the Referee.

B. STATEMENT OF FACTS.

There was a definite conflict in the evidence involved and we wish to point out herein definitely the facts upon which the Referee based his finding and order, and also to point out that certain statements contained in the "Statement of Case" (Appellants' Opening Brief, page 2 et seq.) are not true.

The evidence at the hearings disclosed the following facts:

The bankrupts executed their declaration of homestead on November 15, 1940, and filed and recorded it on November 20, 1940. They had constructed on the premises at the time of the executing of the homestead a building which was to be used for a garage only, which building was the only building on the premises at the time (Transcript, page 60). This building had no modern toilet and bath facilities (Transcript, pages 58 and 65). It had a cement floor and one side of the building was composed of a large garage door (Transcript, pages 46 and 126).

On the date of the recording of the declaration of homestead and prior thereto there was no running water on the premises and the water that was used had to be carried a considerable distance from the premises that the bankrupts were renting from a third person (Transcript, page 47). At the time the bankrupts, husband and wife, were sleeping in the garage building, using a bedroom set that they had purchased and put therein (Transcript, page 47).

During all of the time the bankrupts were renting from one George Gagos an adjoining premises upon which there was a large five-room house (Transcript, page 50). On the rented premises the bankrupts and their family, composed of two sons and a young daughter, had been living for some time (Transcript, page 52). On these rented premises they had all of the furniture which they possessed (Transcript, page 58).

other than the bedroom set which was put in the garage, together with their dishes, cooking utensils, personal effects, clothing (Transcript, pages 56 and 68), food (Transcript, page 58), personal papers and other similar articles. During all of this period of time the children slept, bathed, kept their clothes, had their breakfast and dinner and lived on the rented premises (Transcript, pages 52 and 83) and the bankrupts rather than eating their meals in a restaurant, as stated in appellants' opening brief, page 3, cooked and ate their breakfast and dinner there (Transcript, page 51).

While on one occasion an individual called one evening upon the bankrupts in the garage where they were sleeping (Transcript, page 94), other relatives who called upon the bankrupts during this period prior to and including the date of the recording of the homestead were entertained and fed on the premises rented (Transcript, page 139). Prior to the recording of the declaration of the homestead Mrs. Turnbeaugh cooked all of the evening meals for her family in the rented premises and kept all of her personal effects there. During the period prior to and including the date of the recording of the homestead, according to Clem U. Mulholland, the reputed home of the bankrupts and their family was on the premises which was rented and where Mrs. Mulholland went first to look for them (Transcript, page 139). On one occasion during the period of time herein involved Mrs. Mulholland called upon the Turnbeaughs at the Gagos' house and found the table set for lunch and found all

of the parties involved there with the exception of Mr. Turnbeaugh (Transcript, page 139).

All of the laundry for the bankrupts and their family was done on the rented premises and what water they used was taken from the rented premises. It is a matter of fact that the water they used for drinking at the garage where the bankrupts slept was carried from the rented premises.

C. ARGUMENT.

I.

WHAT CONSTITUTES RESIDENCE IS A QUESTION OF FACT WHICH MUST BE DETERMINED FROM THE EVIDENCE OF THE SURROUNDING CIRCUMSTANCES.

The question of what constitutes actual residence is to be determined primarily from the expressed intention of the parties involved, together with evidence of the surrounding circumstances which are indicative of the actual fact of residence.

Skinner v. Hall, 69 Cal. 195;

Calif. Political Code, Section 52;

Lakas v. Archambault, 38 Cal. App. 363;

13 *Cal. Juris.* 454, Section 30 et seq.

The circumstances involved must evidence the fact that the homestead claimants are in good faith, manifesting a proper intention of making the premises their present residence, their present home, and their present permanent abiding place. Residence is defined in Webster's Dictionary as "that place of abode in

which one lives and makes his home; and where he eats and sleeps, surrounding himself with the comforts of a home and enjoying its immunities and privacies''.

It is the policy of the homestead law to protect a man's home and to give him a place to raise his family free from any claims of his creditors. However, the purpose of the homestead law is that of a shield, and it was never intended to be a sword with which an individual or individuals might defraud their creditors.

The law of the State of California requires that before any premises can become a homestead it must be the bona fide actual residence of the *family*.

Bullis v. Staniford, 178 Cal. 40;

Tromans v. Mahlman, 92 Cal. 1;

McNabb v. Byrnes, 92 Cal. App. 337;

Johnston v. DeBock, 198 Cal. 177;

Babcock v. Gibbs, 52 Cal. 629.

In order for there to be actual residence upon a premises and in order for them to assume the character of a homestead they must be occupied by the claimants' *family*; in other words premises never assume the character of a homestead until there is actual residence thereon by the *family* as a group.

Benedict v. Bunnell, 7 Cal. 245;

Cary v. Tice, 6 Cal. 625;

Tromans v. Mahlman, 92 Cal. 1 at 7;

Prescott v. Prescott, 45 Cal. 58;

Babcock v. Gibbs, 52 Cal. 629;

Aucker v. McCoy, 56 Cal. 524;

Pfister v. Dascey, 68 Cal. 572;

Lubbock v. McMann, 82 Cal. 228.

The case of *Skinner v. Hall*, 69 Cal. 195, seems to be in opposition to the above statement. However, in this case it was assumed by the Court that actual residence did exist upon the premises involved and the Court goes on to point out that actual residence would not be lost where the circumstances required the bankrupts' family to sleep and eat *temporarily* some place else. The case assumes the existence of actual residence, and does not discuss what is necessary to constitute actual residence. As pointed out in 29 *Corpus Juris* 806—Homesteads, Section 53:

“The fact that premises are occasionally occupied as a lodging place of temporary residence will not impress the homestead character thereon, especially where the actual and permanent residence of the debtor and his family is elsewhere.”

II.

APPLYING THE AUTHORITIES TO THE FACTS IN THIS CASE, TOGETHER WITH THE FINDINGS OF THE REFEREE, WE CONCLUDE THE ORDER OF THE REFEREE DENYING THE EXEMPTION AND THE ORDER OF THE DISTRICT COURT DENYING THE EXEMPTION AND CONFIRMING THE ORDER OF THE REFEREE ARE NOT CONTRARY TO LAW OR EQUITY AND THEY SHOULD BE AFFIRMED.

As hereinbefore pointed out the Referee in this case specifically found (Transcript, page 34) that the bankrupts did not actually reside on the premises

herein involved and that any semblance of residence thereon at the time of the declaration was not real but sham and pretended and not bona fide in general.

It is obvious from the evidence in this case that it was the rented Gagos' premises in which the bankrupts and their family, composed of two sons and a young daughter, were actually residing at all times prior to and including the time of the recording of the declaration of homestead. It was here where they had their meals, bathed and kept their clothes and personal effects; it was here where the family surrounded themselves with the comforts of a home; and it was here where they, as a family, enjoyed the immunities and privacies of a home. The conclusion is inescapable that their actual residence during the times that are material herein was in the rented premises and this is not destroyed by the fact that Mr. and Mrs. Turnbeaugh suffered the inconvenience of sleeping in the garage constructed on the premises which they now claim as their homestead.

The garage at no time ever was intended as a dwelling or abiding place. Subsequent to the date of the recording of the declaration of homestead there was completed on the premises a five-room residence involving a considerable expenditure. It was in this latter house where they intended to live and abide and where they all are now living and abiding.

The homestead law of the State of California, as we have hereinabove stated, was and is intended as a shield to protect an individual's family in their home

but the homestead law was never intended to be used to allow an individual to simulate an actual residence for the purpose of defrauding and defeating creditors.

When an individual and his family have a house in which they dwell, in which they make their home by actually living and abiding there and surrounding themselves with the comforts of a home, public policy is such that to a certain extent such a home should be protected from any claim of creditors. But until such actual residence on a premises has been established and a home created it cannot become the subject of a homestead. In the case of *Gaston v. Horn*, 138 N. W. 25 (Iowa), the homestead claimant and his sons were sleeping in a roofless house. They had a trunk and some bedding and other articles therein which had been taken from a house nearby where they had been living. The house upon which the homestead was claimed was not as yet completely habitable. The claimant continued to pay rent for the place where he had previously resided and he continued to get his meals there. The Court held that this was not sufficient occupancy to constitute actual residence sufficient to establish a homestead. It is quite apparent that this is a case substantially the same as the one that is presented to the Court on this appeal. We, therefore, respectfully submit that the order of the Referee denying the exemption and the order of the District Court supporting the Referee's order are amply supported by the facts and the law and equity in this case.

D. CONCLUSION.

Upon the record as made in these proceedings, we reiterate the lower Court has not erred and the order of the District Court affirming the Referee's findings and denying the appellants the homestead exemption should be affirmed.

Dated, Stockton, California,
August 7, 1944.

Respectfully submitted,
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Attorneys for Appellee.